

**STATE OF NEW HAMPSHIRE
BANKING DEPARTMENT**

In re the Matter of:) Case No.: 13-109
)
State of New Hampshire Banking)
)
Department,) Default Judgment
)
 Petitioner,)
)
 and)
)
The Mortgage Specialists, Inc. and Michael)
)
Gill,)
)
 Respondents)
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ORDER OF DEFAULT JUDGMENT

1. This is an Order of Default Judgment entered against The Mortgage Specialists, Inc., and Michael Gill, the above named Respondents. Because of the Respondent Michael Gill’s and his counsel’s verbal pronouncements made during the commencement of the adjudicatory hearing held on August 20, 2013, followed by their voluntary exit from the proceedings, this Presiding Officer has concluded that a default judgment is appropriate for the reasons set forth below and notwithstanding Respondents’ Requests for Findings of Fact and Rulings of Law.

PROCEDURAL HISTORY

2. On April 11, 2013, the New Hampshire Banking Department (“Department”) issued to The Mortgage Specialists, Inc. and Michael Gill, the above named Respondents, an Order to Show Cause and to Produce Records. The Bank Commissioner ordered a hearing to be held on May 15, 2013. On May 2, 2013 the then-presiding officer recused himself as presiding officer over this matter. The Department filed a Motion to Stay Hearing on May 3, 2013. On May 3, 2013, Bank Commissioner Perlow ordered the April 11, 2013, order stayed to the extent of

ordering an alternative presiding officer to hold a hearing within the thirty (30) day default period. The Bank Commissioner ordered that the new presiding officer, once appointed, “shall issue a written scheduling order stating time, date and place of the postponed hearing as soon as practicable.” Bank Commissioner Perlow delegated Presiding Officer Andrew B. Eills on June 14, 2013, effective as of June 5, 2013.

3. On July 11, 2013, I issued a Notice of Prehearing Conference setting a prehearing conference for July 24, 2013, to be held at the Department to address the issues pursuant to NH RSA 541-A:31 and to determine a date for the adjudicative hearing. Due to a conflict by Respondents, an Assented to Motion to Continue Prehearing Conference was filed July 18, 2013. On July 19, the Presiding Officer issued an Amended Notice of Prehearing Conference setting the prehearing conference for July 25, 2013. At the Prehearing Conference, the parties agreed to submit stipulated facts and issues prior to the hearing.

4. By Notice of Hearing dated August 2, 2013, the Presiding Officer set a hearing date for August 20, 2013 for the purpose of participating in an adjudicatory hearing under RSA 541-A: 31, III (b). The legal authorities for the hearing were: RSA 541-A: 30, III, RSA 397-A: 11, RSA 397-A: 12, RSA 397-A: 17, and RSA 397-A: 18. The Notice of Hearing stated that “[t]he Department shall have the burden of setting forth a *prima facie* case, and then the Respondents shall have the burden of showing compliance with applicable law by a preponderance of the evidence,” (Notice of Hearing, paragraph 11) and that “[a]ny Respondent’s failure to appear at the time, date, and place specified may result in the hearing being held *in absentia* and/or default ruling in favor of the Department, without further notice or opportunity to be heard.” (Notice of Hearing, paragraph 12). The Notice of Hearing also provided that the proceedings would be recorded verbatim.

5. On August 13, 2013, the Department's counsel, with the concurrence of the Respondents, filed an Assented-To Statement of Issues and Stipulated Facts. On August 15, 2013, the Department's counsel filed a Motion to Partially Seal Exhibits, to which the Respondents objected by written objection dated August 16, 2013.

6. Prior to the hearing, counsel for the Respondents requested, pursuant to paragraph 13 of the Notice of Hearing, that a certified court reporter be in attendance to transcribe the entirety of the proceedings. The presiding officer granted the request and arranged for the court reporter to transcribe the record of the hearing. In addition and prior to the hearing, Respondents' counsel requested that Respondents be permitted to arrange for the proceedings to be video-taped, and this request also was granted.¹

THE AUGUST 20, 2013 HEARING

7. At the commencement of the August 20, 2013, hearing, I asked that the parties address the Department's Motion to Seal Exhibits and the Respondents' Objection to the Motion to Seal Exhibits. After hearing oral argument from counsel for the parties, I ruled in favor of Department's Motion to Seal Exhibits. This ruling resulted in those exhibits marked "confidential" on the Department's exhibit list remaining confidential under N.H. RSA 383:10-b.² In addition, and as part of the ruling on the Motion to Seal Exhibits, I also ruled that during the hearing Department's counsel could move for the Presiding Officer to order the suspension of the video-taping of the proceedings while those particular exhibits were introduced and

¹ Respondents' counsel requested both the presence of a certified court reporter and the ability to video-tape the proceedings through emails to the Presiding Officer.

² N.H. RSA 383:10-b provides: "All records of investigations and reports of examinations by the banking department, including any duly authenticated copy or copies thereof in the possession of any institution under the supervision of the bank commissioner, shall be confidential communications, shall not be subject to subpoena and shall not be made public unless, in the judgment of the commissioner, the ends of justice and the public advantage will be subserved by the publication thereof. The commissioner may furnish to the federal supervisory authorities and to independent insuring funds which he deems qualified such information and reports relating to the institutions under his supervision as he deems best. On motion for discovery filed in any court of competent jurisdiction, in aid of any pending action, the court, after hearing the parties, may order the production of such records, investigations and reports for use in such action whenever it is found that justice so requires, subject to such reasonable safeguards imposed by the court as may be necessary to prevent use by unauthorized persons or publicity of irrelevant portions thereof."

testimony elicited concerning such confidential exhibits. While recognizing the potential for unwieldiness that this ruling posed, I determined this procedural mechanism was proper because the order of the introduction of the confidential exhibits could vary from their individual exhibit numbers and because the testimony's content, to the extent any testimony regarding such exhibits would be elicited, would not be known until introduced. The ruling on the Motion to Seal Exhibits affected neither the certified court reporter's ability to transcribe the entirety of the hearing nor the recording of the hearing. Moreover, the ruling did not impede the Respondents from presenting their defense and contesting the evidence, nor did it shift the burden of proof set forth in the Notice of Hearing.³

8. During oral argument concerning the Department's Motion to Seal, Respondent Michael Gill, both through his counsel present and on his own, stated that the entirety of the hearing should be video-taped because at a later date the Respondents desired to use the video-tape in a different forum or forums to demonstrate certain allegedly improper or illegal actions taken by the Department against the Respondents. When I stated that the ruling on the Department's Motion to Seal would stand, the Respondent Michael Gill and his counsel stated they would decline to participate or to proceed any further in the hearing, and acknowledged that a fine or fines could be levied against the Respondents. They then departed from the hearing room. Immediately after, counsel for the Department requested a directed verdict in favor of the Department, which was taken under advisement.

POST-HEARING PLEADINGS

9. Subsequently, on August 23, 2013 the Respondents filed Proposed Findings of Fact and Conclusions of Law and a Proposed Order. The Department filed a Motion for Default Judgment, Memorandum of Law, and a Proposed Order on August 26, 2013.

³ Notice of Hearing, paragraph 11.

APPLICABLE LAW AND DISCUSSION

10. The Respondents' Proposed Findings of Fact present multiple assertions of fact and statements, the overwhelming majority of which cannot be ruled upon due to the lack of a hearing and presentation of evidence. While the August 20 hearing provided an opportunity to offer factual background and testimony to support the Respondents' Proposed Findings of Fact and Conclusions of Law, the Respondents chose not to participate and instead chose to leave the hearing room prior to the commencement of the Department's presentation. In their Proposed Findings the Respondents have not raised any indication that the ruling in favor of the Department's Motion to Seal Exhibits either impeded or inhibited in any manner the ability of the Respondents to present their arguments against the fines sought by the Department in its Order to Show Cause and to Produce Records.

11. The parties' submitted Assented-To Statement of Issues and Stipulated Facts is the only area of agreement between the parties concerning the factual circumstances and legal issues before this Presiding Officer, and as such may be considered in evaluating whether a default judgment is appropriate in this instance.

12. N.H. RSA 541-A:31 governs the process for adjudicatory proceedings in this matter. Pursuant to N.H. RSA 541-A:30-a, the Department has adopted the N.H. Attorney General's model rules governing adjudicative proceedings. N.H. Admin. R. Jus 810.02, in pertinent part, provides that "[i]f any party ... fails to attend a hearing, the presiding officer shall declare that party to be in default ...". At the hearing Respondent Gill and his counsel acknowledged to me that a default judgment could be entered against them, and then departed from the hearing room. This requires a finding that, for purposes of N.H. Admin. R. Jus 810.02, the Respondents failed "to attend" the hearing. For this reason, a default judgment is itself appropriate. A review of the record as it existed at the close of the hearing, moreover, also serves to establish the appropriateness of a default judgment.

THE DEPARTMENT'S PRIMA FACIE CASE

13. In their Assented-To Statement of Issues and Stipulated Facts (“Assented-To Statement”) the parties jointly agreed to and identified the legal issues in this matter. They are:

(a) Whether the actions of Respondent The Mortgage Specialist, Inc. (“Respondent TMS”) from March 4, 2013 to June 4, 2013, violated or were in violation of the following:

(1) RSA 397-A:11, II, failure to supply out-of-state records within twenty-one (21) days of request, and whether Respondent TMS should pay an administrative fine of \$50 per day up to a statutory maximum of 60 days;

(2) RSA 397-A:11, I, failure to maintain the same records in a reasonably accessible location, and whether Respondent TMS should pay an administrative fine of \$2,500; and

(3) RSA 397-A: 12, VII, failure to facilitate the examination, and whether Respondent TMS should pay an administrative fine of \$2,500.

(b) Whether, if Respondent TMS violated both RSA 397-A: 11, I, and RSA 297-A: 12, VII, Respondent Michael Gill should pay an administrative fine of \$5,000 (\$2,500 per violation) pursuant to RSA 397-a: 21, V, because as owner of Respondent TMS, Respondent Michael Gill directly or indirectly controls Respondent TMS.

14. With regard to Issue (a) (1), the Respondent TMS has admitted that it exceeded the statutory requirement in RSA 397-A:11 of the twenty-one (21) day period to supply to the Department upon request business records stored in Colorado, an out-of-state location. Assented-To Statement, Paragraph 19.

15. With regard to Issue (a) (2) Respondent TMS has admitted that after it had received certain business records from the out-of-state location, it failed to make these records accessible to the Department although such records were in the possession of Respondent Gill. Assented-

To Statement, paragraph 26. Moreover, not until June 4, 2013 did the Respondents provide these records in a full and complete fashion to the Department. Assented-To Statement, paragraphs 33, 37.

16. With regard to Issue (a) (3), Respondent has admitted that the business records sought by the Department were within Respondent's possession and that the computer disc containing such business records provided to the Department's examiners on May 23, 2013, did not contain all the requested business records subject to examination. Assented-To Statement, paragraphs 26, 33, and 34. Not until June 4, 2013, did the Respondents provide these records in a full and complete fashion to the Department. Assented-To Statement, paragraphs 33, 37. RSA 397-A: 12, VII provides, in pertinent part, that "[e]very person being examined . . . shall make freely available to the commissioner or his or her examiners . . . records. . . relating to the examination and shall facilitate the examination." "To facilitate" is commonly understood to make something easier, or to help something run more smoothly and effectively. Based upon Respondent TMS's admission in the Assented-To Statement, the records were neither "freely available" to the Department's examiners for a significant period of time, nor did Respondent TMS "facilitate" the Department's examination.

17. With regard to Issue (b), Respondent Gill has admitted that at all times during the period from March 4, 2013 to June 4, 2013, he was the owner and principal of Respondent TMS for the purposes of RSA 397-A:21,

FINAL ORDER

18. This Presiding Officer expected, and would have preferred, the Respondents to engage in their statutory right to a full hearing. The Respondents, however, chose not to proceed before the introduction of the Department's presentation and left the hearing room after acknowledging that they were aware a default judgment could be entered. Based upon the

Assented-To Statement of Issues and Stipulated Facts, moreover, the Respondents committed violations of particular statutes under which Respondents are governed.

It is hereby ORDERED:

- I. The Department's Motion for Default Judgment is granted.
- II. Respondents' Proposed Findings of Fact 1 through 3 are granted, and 4 through 27 are neither granted nor denied.
- III. Respondents' Conclusions of Law 28 through 38 are denied.
- IV. Respondent TMS violated RSA 397-A: 11, II. and is ordered to pay an administrative fine of \$3,000.00.
- V. Respondent TMS violated RSA 397-A:11, I. and is ordered to pay an administrative fine of \$2,500.00.
- VI. Respondent TMS violated RSA 397-A:12, VII and is ordered to pay an administrative fine of \$2,500.00.
- VII. Respondent Gill, as an owner and principal under RSA 397-A: 21, V., violated RSA 397-A:11, I and is ordered to pay an administrative fine of \$2,500.00.
- VIII. Respondent Gill, as an owner and principal under RSA 397-A: 21, V., violated RSA 397-A:12, VII. and is ordered to pay an administrative file of \$2,500.00.
- IX. Respondent TMS is **HEREBY ORDERED** forthwith to pay to the Department administrative fines totaling \$8,000.00.
- X. Respondent Gill is **HEREBY ORDERED** forthwith to pay to the Department administrative fines totaling \$5,000.00.

XI. Failure to abide by this Order may result in civil or criminal penalties.

XII. The process for appeal is governed by RSA 541: 3, RSA 541: 4, and Administrative Rule Jus 813.04.

SO ORDERED.

Dated: September 17, 2013

SIGNED,

/S/
Andrew B. Eills, Esq.
Presiding Officer